REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 397 of 2003

(From the Original Conviction and Sentence in Criminal Case No. 24204 of 2003 of the Chief Magistrate's Court at Makadara –Mrs Juma - PM)

ZACHARIA MUGO MACHARIA ……..…….. APPELLANT

VERSUS

REPUBLIC ……...….RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 24204 of 2003 of the Chief Magistrate's Court at Makadara –Mrs Juma - PM)

JUDGMENT

The Appellant was convicted by the Principal Magistrate, Makadara Law Courts on four counts of robbery with violence contrary to Section 296 (2) of the Penal Code. He was thereafter sentenced to death on all the counts. We note however in passing that the Learned Magistrate erred in imposing four death sentences on the Appellant as the Appellant can only logically be executed one and not four times over. What the Learned Magistrate ought to have done if she was minded to impose death sentences on all counts was to order that the sentence in respect of count one be carried as those in counts two, three and four are stayed and or held in abeyance.

The Appellant was aggrieved by the conviction and sentences and hence lodged the instant Appeal. In his petition of Appeal, the Appellant faults his conviction by the Learned Magistrate on the grounds that his identification was not positive, his arrest was suspect and that his defence was not given due consideration.

The Prosecution case was that on 7th October, 2002, at about 2 p. m., PW1, Complainant in count one, PW2, Complainant in count two, PW3 Complainant in count three and PW4, the Complainant in count four were seated at Mobil Petrol Station along Juja road. PW1, PW2 and PW3 were pump attendants at the said station whereas PW4 was a customer. As they sat, they suddenly saw about seven people come towards them running while armed with pistols. They ordered all the four to lie down. The four obeyed and were robbed of the items set out in the charge sheet. On accomplishing their missions the robbers then fled towards slums. It was then that the victims screamed for help. PW5 who was on patrol duties with P. C. Mativo in the neighbourhood responded to the screams and together with other members of the Public gave chase and managed to arrest one suspect who was brought to the Petrol Station and PW1, PW2 and PW4 managed to identify him as having been among those who robbed them earlier on. PW3 did not recognise whoever robbed him but claimed that he had seen the suspect rob their customer (PW4). The suspect referred to by the witnesses is the Appellant herein. The Appellant was then taken to

Pangani Police Station and was subsequently charged.

Put on his defence, the Appellant in his unsworn defence stated that at about midday on the same date he went home for lunch. He then headed for a Public toilet where a levy of Kshs.5/= is paid but he did not have the money. He requested free use of the facility but the attendants turned against him, claiming that he must have been one of the robbers. He was then taken to the petrol station and he was told that he was one of the thieves. To the Appellant therefore the case was a frame up as he never committed the offence.

In support of the Appeal, the Appellant has tendered written submission which we have duly considered. The Appeal was opposed by the State. Mrs. Gakobo, Learned State Counsel submitted that PW1, PW2, PW3 and PW4 positively identified the Appellant as having been among the robbers. That the robbery was committed at 2.30 p. m. In broad daylight and it took 10 minutes. To Counsel, this was sufficient time to enable the witnesses to positively identify the Appellant. Further the Appellant was chased and arrested by Police and members of the Public soon after the robbery. Therefore the issue of mistaken identify cannot arise. As to failure to recover any of the stolen items on the Appellant, Counsel submitted that, that alone did not exonerate the Appellant from the offence. Counsel conceded that none of the members of the Public who participated in the chase and eventual arrest of the Appellant were called to testify. However that was not fatal to the Prosecution case, Counsel submitted. On the Appellant's defence, Counsel submitted that the same was duly considered by the Learned Magistrate and dismissed as an afterthought.

It is trite law that it is the duty of the first Appellate Court to reconsider the evidence, evaluate it and draw its own conclusions in order to satisfy itself that there is no failure of justice, See ***NGUGI VS REPUBLIC (1984) KLR 729 AT PAGE 730.***

The conviction of the Appellant was based on alleged identification by PW1, PW2 and PW4 made at the scene of crime as well as his chase and eventual arrest by members of Public together with PW5. We are aware that where the evidence relied on to implicate an accused person is entirely that of identification, that evidence should be watertight to justify a conviction. See ***REPUBLIC VS ERIA SEBWATO (1960) EA 174*** cited with approval in ***KIARIE VS REPUBLIC (1984) KLR 739 AT PAGE 744 PARAGRAPH 3.***

PW1, PW2, PW3 and PW4 were suddenly and unexpectedly accosted by a group of thugs brandishing firearms, who immediately ordered them to lie down. From the recorded evidence, the said witnesses were in shock and fear. Indeed confusion reigned. It would appear that the said witnesses were not given any chance or opportunity at all to look at and or observe any of the robbers. Accordingly and though the offence was committed in broad daylight – 2.30 p. m. to be precise and took about 10 minutes the witnesses had no chance or opportunity at all to observe the robbers sufficiently as to be able to identify any one or anyone of them later. This observation is buttressed by the fact that none of the witnesses disclosed to the Court the time they took to observe the Appellants. In view of the circumstances prevailing during the attack, the brevity of the same and the number of the robbers involved, we are not persuaded that the witnesses would have been in a position to identify any of the robbers at the locus in quo. Our doubts are further heightened by the fact that there was no agreement among the witnesses as to the number of the robbers involved. Whereas PW1, PW3 and PW4 stated in Court that they were attacked by seven thugs, PW2 however alleged that they were only six. Further whereas PW1 and PW2 claimed that all the robbers were armed with firearms, PW3 and PW4 did not as much as allude to the said claim in their evidence.

The Appellant was allegedly chased and arrested by the members of the Public together with PW5. On this issue, the Learned Magistrate in her Judgment commented thus:-

"…..***The Police officer confirms that the accused was one of the people running from the scene where an alarm had been raised and he was arrested before his eyes….***"

From the evidence on record none of the key witnesses was involved in the chase and arrest of the

Appellant. The Appellant was arrested by members of the Public. By the time PW4 and PW5 arrived at the scene, the Appellant had already been arrested. Had the evidence on record been that the witnesses chased the Appellant without loosing sight of him at all until he was arrested, then such evidence of identification would have been reliable. To the extent that none of the Complainants aforesaid actually chased and arrested the Appellant, the links in the chain were broken and accordingly the evidence was unsafe and unreliable. As already stated, the Appellant was arrested by members of the Public. PW4 and PW5 arrived at the scene only to find the Appellant already arrested. None of the members of the Public were called to testify and shade light on what basis they arrested the Appellant. It cannot be assumed as the trial Magistrate did, that the person so arrested was the same person who was in a group of others that raided the Petrol station. In the case of ***KOTIA VS REPUBLIC CRIMINAL APPEAL NO. 191 OF 2003, (unreported)*** it was held:-

"….***Where a robber is arrested after a robbery by a person or a group other than the one chasing him, it cannot be assumed that he is the person who had robbed unless there was evidence of identification…..***"

This holding is on all fours with the instance case. There was evidence of identification passed on to the members of the public prior to the Appellant's arrest. None among the five witnesses who testified ever alleged to have pointed out the Appellant to the members of the Public before their chase and eventual arrest of the Appellant. It may well be possible that the members of the public arrested an innocent person.

The Appellant upon arrest was not found with any items stolen from the victims. According to PW1, PW2 and PW4, it is the Appellant who robbed them of cash and a wrist watch. He was also armed with a firearm. Where could these items have gone. The evidence of PW4 and PW5 who claimed to have been involved in the chase and arrest of the Appellant does not suggest that they saw the Appellant throw away or drop the said items nor did they state that upon arrest by the members of the public he was searched and anything recovered from him.

Upon arrest the Appellant was taken back to the scene of crime where PW1, PW2 and PW3 purported to identify him as one of the robbers. This action by PW5, a Police officer, was wrong and prejudicial to the Appellant. He was thereby exposed to the witnesses. He should instead have taken the Appellant to the Police Station. It would appear that the Appellant was taken to the scene purposely to expose him to PW1, PW2 and PW3. In the case of ***PAUL MWANIKI KITILU VS REPUBLIC, CRIMINAL APPEAL NO. 270 OF 2002,*** the Court of Appeal stated:-

"….***The proper procedure would have been for the two Police officers and PW7 to take the Appellant straight to the Police Station, arrange for an identification parade and see if the Mousleys would have been able to identify the Appellant at a properly organized parade. The kind of identification alleged by PW1, PW2 and PW3 though strictly not dock identification can have very little value to the Prosecution case…….. It is very likely and very natural that if the Police confront Complainant with an individual arrested soon after a robbery on them the witnesses would say the person so arrested was among those who robbed them….***"

This is exactly what happened here. It is worthy repeating that a person taken to the scene of crime by a Police officer so soon after the crime as in the instant case is easily amenable to being pointed by the victims as one of the robbers. In our Judgment, the act of taking the Appellant to the scene of crime was deplorable and was certainly prejudicial to him.

The Appellant upon arrest, according to PW1 had clothes stinking of sewage. None of the witnesses testified that at the time of the robbery, the Appellant or any of the robbers were stinking of sewage. No evidence was led as to show the Appellant could have come by the sewerage either. The Appellant in his defence had raised the issue of having gone to a public toilet and upon refusing to pay for the facility was set upon by the Public toilet attendants beaten and branded as one of the thieves. Is it possible that the sewerage referred to could have been as a result of this encounter? The Learned Magistrate should have explored such possibility.

The Learned Magistrate faulted the Appellant's defence on the basis that the Appellant never raised the issue of the toilet in cross-examination of PW4 and PW5. This was a misdirection. An accused person has no duty to elicit crucial evidence by cross-examination of the Prosecution witnesses. It was so held in the case of ***BONIFACE OKEYO VS REPUBLIC CRIMINAL APEPAL NO. 52 OF 2000 (Mombasa) unreported).*** The Court of Appeal in this case delivered itself thus on the issue:-

"……***The Appellant had no duty in law to raise a serious defence nor did he have a duty to elicite crucial evidence by cross-examination of Prosecution witnesses….***"

In our view the defence advanced by the Appellant was plausible and in the absence of the evidence to the contrary the Court ought to have believed and acted on it.

In the result, we come to the conclusion that the Appellant's conviction was unsafe. Accordingly, we allow the Appeal, quash the conviction and set aside the sentences imposed.

The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated at Nairobi this 1st day of February, 2007.

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LESIIT

JUDGE

……..

MAKHANDIA

JUDGE

Judgment read, signed and delivered in the presence of:-

Appellant

Mrs. Gakobo for State

Erick/Tabitha Court clerks

……..

LESIIT

JUDGE

…….

MAKHANDIA

JUDGE